Supreme Court, U.S.
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CASE #_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

(CHARLES WILLIAM O'BRIEN),

F & S PROPERTIES,
WKH CORPORATION,
HWK CORPORATION
HKW PROPERTIES
JASPER INVESTMENT CORPORATION,
Petitioners,

v.

BANK ONE, COLUMBUS, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioners
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September, 1992

QUESTIONS PRESENTED FOR REVIEW

Whether the Ohio Civil Rule 3(A) commencement requirement that **service be obtained within one year of filing in order to properly commence an action** is extended by the filing of an Amended Complaint and, thus, accords due process.

THE PARTIES

The parties are F & S Properties, WKH Corporation, HWK Corporation, HKW Properties, Jasper Investment Corporation and Bank One, Columbus, N.A.

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OPINIONS BELOW

The prior opinion most pertinent to this Petition and the judgment under review is the December 31, 1991 decision of the 10th District Court of Appeals of Ohio, Bank One, Columbus, N.A. v. Charles William O'Brien, et al., 91AP-166; 91AP-141 (unreported). A petition for discretionary review was denied by the Supreme Court of Ohio on May 27, 1992. The decision under review and the order denying review are reproduced in the Appendix of this Petition.

JURISDICTION

The Entry of the Ohio State Supreme Court was journalized on May 27, 1992. This Petition was filed within 90 days of May 27, 1992, including the extension. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(3) and 2102(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

On November 18, 1990, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $268,000.00.

On August 18, 1981, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $920,000.00.

On February 5, 1982, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $421,000.00.

On the foregoing dates, Karen Sue O'Brien was the title holder of certain improved parcels of real estate. Prior to the execution and delivery of the Note dated November 18, 1980, Bank One requested of Charles William O'Brien that copies of all title descriptions regarding the aforementioned real estate be provided to Bank One to enable the bank to determine what, if any, collateral could be secured. Bank One then proceeded, unilaterally, to attach all of Karen Sue O'Brien's real estate as collateral for the loans by attaching the property descriptions to the Mortgage Deeds, after such documents were signed, and without consent, permission or knowledge of Karen Sue O'Brien or Charles William O'Brien.

In June, 1982, Bank One received $100,000.00 from the sale proceeds of the personal residence of Karen Sue O'Brien and Charles William O'Brien. Prior to the closing, Bank One

executed and delivered two sets of partial releases. One set of releases pertained to the aforementioned property which was sold. The second set released the family residence as well as all those properties wrongfully encumbered by Bank One in 1980, 1981 and 1982.

In late 1986, with the passage of tax laws changing the real estate industry, Karen Sue O'Brien gave all her properties to various personal and corporate entities belonging to her children, Holly, Kelly and William O'Brien (O'Brien Entities). Thereafter, from January, 1987 to January, 1989, the loans with Bank One remained current and principal was substantially reduced.

During the years following the gift of the properties to the O'Brien children, the second set of releases was filed and the various properties were re-financed with other lenders.

During the years following the gift of the properties, Bank One accepted numerous checks representing payments in full of interest and principal on the Promissory Notes, all other

interest and principal being current as of January of 1989.

However, Bank One continually failed and refused to apply sizeable payments to principal on the loans targeted by Charles William O'Brien. Instead, Bank One, at its own discretion, used the monies to pay off lower interest bearing loans which were unsecured. Regrettably, although the loans were current as of January, 1989, Bank One refused to alter its course of self-dealing and misapplication of payments. Charles William O'Brien notified Bank One in writing that unless and until Bank One reconciled the payments and their misapplications, no further monies would be forthcoming.

In disregard of the rights of Karen Sue O'Brien, Charles William O'Brien and the O'Brien Entities, Bank One filed a Complaint seeking judgments on three "Cognovit" Notes signed by Karen Sue O'Brien and Charles William O'Brien and obtained judgment on March 17, 1989.

On April 5, 1989, Charles William O'Brien, acting on behalf of himself, filed a Civil Rule 60(B) Motion for Relief

from the March 17, 1989 Judgments.

On May 18, 1989, Bank One moved for leave to file an Amended Complaint.

On June 7, 1989, the Trial Court granted the Motion for relief, indicating that if the allegations contained in the Motion were true, Bank One could be barred from any judgment. Bank One was also given leave to amend.

On August 3, 1989, Bank One instructed the Clerk of the Courts to serve Karen Sue O'Brien by certified mail. On the same day, Bank One requested that the Clerk of Courts serve the O'Brien Entities by ordinary mail.

On February 27, 1990, Bank One instructed the Clerk to personally serve its Amended Complaint upon Karen Sue O'Brien and the O'Brien Entities.

On April 9, 1990, Bank One instructed the Clerk of the Common Pleas Court to issue summons and a copy of the Amended Complaint for service by ordinary mail upon WKH Corporation, HWK Corporation and Jasper Investment

Corporation all C/O Tammy M: Cordell, Statutory Agent.

On April 25, 1990, Bank One instructed the Clerk of the Common Pleas Court to serve by publication Karen Sue O'Brien, F & S Properties and HKW Properties. On April 27, 1990, Bank One instructed the Clerk of the Common Pleas Court to serve WKH Corporation, HWK Corporation and Jasper Investment Corporation by personal service. On May 8, 1990, the notice of receipt of personal service of summons on HWK Corporation, WKH Corporation and Jasper Investment Corporation all C/O Kelly P. O'Brien was filed.

On June 22, 1990, Bank One moved for leave to file its Second Amended Complaint.

At a July 27, 1990, hearing the Trial Court took Bank One's Motion to file its Second Amended Complaint under advisement; ordered that Charles William O'Brien respond to Bank One's interrogatories and produce documents responsive to Bank One's request for production of documents in ten days from the date of the hearing; indicated that Charles William

O'Brien, WKH Corporation, HWK Corporation and Jasper Investment Corporation had not responded to Bank One's Amended Complaint and were in default; granted Charles William O'Brien and the aforementioned corporations seven days within which to answer Bank One's Amended Complaint; and reaffirmed the trial date of January 28, 1991.

On August 8, 1990, the O'Brien Entities moved to dismiss the action against them.

On September 5, 1990, the Trial Court granted Bank One's Motion for leave to filed its Second Amended Complaint.

On September 5, 1990, the Trial Court journalized its orders from the July 27, 1990 hearing, ordering that: WKH Corporation, HWK Corporation and Jasper Investment Corporation respond to the Amended Complaint by August 8, 1990; and the trial date of January 28, 1991 was reaffirmed.

On September 6, 1990, Bank One filed its Second Amended Complaint and instructed the Clerk of the Common Pleas Court to serve the Second Amended Complaint by

publication upon Karen Sue O'Brien, F & S Properties and HKW Properties.

On January 28, 1991, Bank One filed its Motion for Default Judgment and Dismissal against Karen Sue O'Brien, Charles William O'Brien and the O'Brien Entities.

On January 29, 1991, the Trial Court, by Journal Entry, denied the O'Brien Entities' Motion to Dismiss and ordered them to answer Bank One's Second Amended Complaint within 14 days.

On February 12, 1991, the Trial Court signed the Entry of Judgment as against Karen Sue O'Brien and Charles William O'Brien and the O'Brien Entities.

On February 12, 1991, the Trial Court signed a Judgment Entry of Foreclosure as against Karen Sue O'Brien and Charles William O'Brien and the O'Brien Entities.

On February 12, 1991, the O'Brien Entities filed a Notice of Appeal.

On March 11, 1991, the Trial Court entered an ex parte Amended Judgment Entry and Decree in Foreclosure.

The Tenth Appellate District Court of Franklin County, Ohio, reached a decision on December 17, 1991 which indicated that the filing of an Amended Complaint, even though outside the Civil Rule 3(A) requirement that service must be obtained within one year of the filing of the original Complaint, extended the one year cut-off for such service.

The Supreme Court declined to review the issues regarding commencement in its Entry of May 27, 1992.

REASONS FOR GRANTING THE WRIT

The underlying case was filed by Bank One on March 17, 1989. After the passage of more than one year, Bank One had not obtained service upon any of the O'Brien personal or corporate Entities - solely due to Bank One's failure to follow the provisions contained in Ohio Civil Rule 4, et seq. to obtain such service - which includes but is not limited to service by publication or, in the case of the corporate entities, service

upon the Secretary of State pursuant to Ohio Revised Code Section 1701.07(H). Bank One was imprudent and dilatory in its attempts at service as either of the above-mentioned attempts at service would have guaranteed service with the one year requirement of Civil Rule 3(A).

Bank One's Amended Complaints of June 7, 1990 and September 6, 1990 were not new or re-filed Complaints and they both related back to the initial filing of March 17, 1989. The Entities relied upon established Ohio case law and refused to enter the fray, particularly as such Entities were not in privity with Bank One and owed Bank One no monies.

Ohio law deems completion of service of Civil Process as the prerequisite to the commencement of an action. Completion of service determines the Court's authority: State ex rel. Balson v. Harnishfeger (1978), 55 Ohio St. 2d 38.

For a Court to acquire jurisdiction, there must be proper service of summons and a judgment rendered without proper service is a nullity and void: State ex rel. Ballard v. O'Donnell

(1990), 50 Ohio St. 3d 182 following Lincoln Tavern, Inc. v. Snader (1956), 165 Ohio St. 61 at page 64.

It is the completion of original process which is essential to clothe Trial Court with jurisdiction to proceed: Baldine v. Klee (1968), 14 Ohio App. 2d 181; Lash v. Miller (1977), 50 Ohio St. 63 followed at O.B. Corporation d/b/a Lincoln Village Lanes v. Cordell, Case No. 87AP-1184, unreported Franklin County, Court of Appeals (1988).

Service of notice by publication is obtained only upon last publication of notice of service for purposes of rule providing that civil action is commenced with Court if service is obtained within one year from such filing, Ohio Rules Civ. Prac., Rules 3(A), 4.4, 4.4(A); Pistner v. Baxter, 2 Ohio App. 3d 69, 440 N.E. 2d, 812.

In Ohio, it is contemplated that original service of process be effected only through and by the Clerk of Courts, Civil Rule 4(B), et seq.; Samson Sales v. Honeywell, Inc. (1981), 66 Ohio St. 2d 290. Fundamental due process

requires "notice" to the Defendant sufficient to apprise him of the action's pendency so he may represent his objections thereto: Regional Airport Authority v. Swinehart (1980), 62 Ohio St. 2d, 403 and Mitchell v. Mitchell (1980), 64 Ohio St. 2d, 49.

A Defendant, who had not been served with process within one year from the filing of the action against her, had no obligation to move or otherwise plead within the year and her failure to do so would not have waived her right to affirmative defense of lack of personal jurisdiction: Maryhew v. Yova, 11 Ohio St. 3d 154.

Inaction upon part of the Defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with necessity of service. The Civil Rules do not change this common law of Ohio: Maryhew v. Yova, supra.

The philosophy of Civil Rule 3(A) is that the Court dockets should be cleared if service has not been attained

within the reasonable time of one year, Maryhew v. Yova, supra.

Within the first year of Bank One's initial filing on March 17, 1989, Bank One did not reasonably undertake to avail itself of any adequate or prudent measures to obtain service under the Ohio Civil Rules, Rule (4), et seq. or under the statutory provisions pursuant to Ohio Revised Code Section 1701.07(H) which provide that service upon a corporation may be effectuated by certified mail service upon the Secretary of State.

Until the Tenth District Court of Appeals decision rendered December 17, 1991, the Entities were on solid ground. The Supreme Court of Ohio had decided a string of related cases supporting the Entities' position - particularly in light of the dilatory conduct by Bank One.

During the course of the first appeal, the Supreme Court of Ohio handed down a decision in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d, 549. It is upon the

Goolsby case that Bank One and the Tenth District Court of Appeals upheld service upon the O'Brien Entities via extension of the requirements of Ohio Civil Rule 3(A).

It will be important, therefore, to analyze Goolsby and discuss why that decision sets an inappropriate standard for service in Ohio as adopted by the Appellate decisions in this case and consequential denial of due process.

Bank One, depending upon Goolsby, argued and the Appellate Court adopted the idea that successive amendments to an initial Complaint can cure the failure of service defects under Ohio Civil Rule 3(A) by extending the time for commencement of an action. Bank One used successive amendments to its original Complaint to circumvent the requirements of Ohio Civil Rule 3(A) and the existing Ohio case law upon which the O'Brien Entities relied.

In the Goolsby case, Plaintiff Goolsby filed her Complaint on February 6, 1986 and asked the Clerk to refrain from service; gave instructions for service on July 17, 1987,

obtained service on July 23, 1987, then turned around and dismissed the action pursuant to Ohio Civil Rule 41(A)(2) with approval of the Trial Court. On July 27, 1989, Plaintiff Goolsby refiled her Complaint pursuant to Ohio's Saving Statute, Revised Code Section 2305.19 and a subsequent Motion by the Defendant to dismiss pursuant to Civil Rule 3(A), i.e., lack of timely commencement, was granted.

The holding in Goolsby did not reverse or modify any of the aforementioned cited cases which require service within one year to achieve commencement. Goolsby did not apply or address the issue of an Amended Complaint. The Goolsby Trial Court allowed Plaintiff Goolsby to continue the action despite her dilatory instruction to the Clerk not to issue a summons. Then, the Goolsby Trial Court approved Plaintiff Goolsby's dismissal without prejudice under Ohio Civil Rule 41(A)(2) on November 11, 1988. When Plaintiff Goolsby attempted to refile an identical Complaint on July 27, 1992, the Defendant moved to dismiss the second suit because the second Complaint

had not been served within one year of the original filing on February 6, 1986. The sole reason for the reversal in Goolsby was the abuse of discretion of the Trial Court in preventing a trial upon the merits by avoidance of the Savings Statute. This fact is clearly demonstrated by the language of the Goolsby case.

The Supreme Court of Ohio stated that the Goolsby Trial Court failed to apply the Ohio Civil Rules, particularly Civil Rule 4(E); that the Goolsby Trial Court should have, upon its own initiative, dismissed Plaintiff Goolsby's Complaint without prejudice as service was neither instructed nor obtained within six months of the initial filing; that Ohio Civil Rule 3(A) is designed to clear the dockets of cases in which a Plaintiff has not pursued service upon a Defendant; that in most instances, the rule would be applied when a Plaintiff has neglected to again attempt service after original service of process fails; that it was beyond question that the rule should have been applied in the Goolsby action where the Clerk was

instructed to refrain from attempting service.

However, the Goolsby Trial Court did not act pursuant to Ohio Rule by its inaction or by its action. By its inaction, the Goolsby Trial Court allowed Plaintiff Goolsby to file her Complaint, wait over one year and 5 months to instruct the Clerk to make service and obtain service within the statute of limitations period on July 23, 1987. Then, the Goolsby Trial Court sought to deny Plaintiff Goolsby her right to trial on the merits by misapplying Ohio Civil Rule 3(A). The Supreme Court of Ohio stated that "Under these circumstances, an application of Civil Rule 3(A) barring Plaintiff Goolsby from obtaining a resolution on the merits would not comport with the spirit of the Civil Rules", further finding that Goolsby's second Complaint was valid under the Savings Statute based upon the fact that her first action had been commenced within the limitation period and subsequently dismissed without prejudice.

The Supreme Court of Ohio was adamant about the Trial Court's inaction over Plaintiff Goolsby's dilatory conduct regarding the instruction not to make or timely pursue service, stating emphatically that the proper action by the Goolsby Trial Court would have been to dismiss Plaintiff Goolsby's initial Complaint pursuant to Ohio Civil Rule 4(E) without prejudice, thereby causing Plaintiff Goolsby to refile her case.

Ohio Civil Rule 4(E) states:

"Effective July 1, 1984, Rule 4(E) was added to Rule 4 by amendment. The new subdivision, patterned after recently adopted Federal Civil Rule 4(j), provides that if the summons and complaint are not served upon a defendant within six months and the plaintiff, attempting in-state service of process, cannot show good cause why service was not effectuated, the court shall dismiss the action without prejudice."

"It should be noted that Rule 6, of the Common Pleas Court and Municipal Court Superintendence Rules, has provided at least since 1979 that an action may be dismissed

within six months after filing if no "proceedings" have been "taken therein." However, in Twardowski v. Cooper, Unreported, No. 8105 (Ohio Ct. App. Second Dist., filed May 2, 1983) the court held that M.C. Sup. R. 6 could not be relied upon in order to dismiss an action when service of process had not been effectuated in six months. The court stated that the one-year provision of Rule 3(A) to perfect service of process in civil actions prevails over M.C. Sup. R. 6 Rule 4(E) was undoubtedly intended to supersede the holding in the Twardowski case and at the same time avoid conflict with Rule 3(A). The reasons are several."

"First, M.C. Sup. R. 6 is not specifically directed to service of process nor does it state whether a dismissal pursuant to the rule is or is not without prejudice. In light of the wording of M.C. Sup. R. 6, the Twardowski case was correct in holding that the six-month M.C. Sup. R. 6 provision conflicted with the one-year provision of Rule 3(A). In contrast, Rule 4(E) is specifically directed to service of process

and specifically states that a dismissal under the rule is without prejudice. Moreover, the rule provides for notice and an opportunity to show cause before the action may be dismissed."

"Second, Rule 4(E) is merely an administrative regulation applicable only to civil cases involving in-state service of process. The rule is directed toward clearing the docket of those non-diligent plaintiffs who neglect follow-up, in-state process then original in-state service of process fails. The rule does not apply to the more time-consuming procedures involved in out-of-state or foreign service of process. The fact that Rule 4(E) is of limited application indicates its administrative, docket-clearing purpose."

"Third, because a Rule 4(E) dismissal is a dismissal without prejudice, thus affording a party the opportunity to file over again, such a dismissal does not conflict with Rule 3(A). Rule 3(A) bars an action only if service of process has not been effected within one year after the filing of the complaint. Lash

v. Miller (1977), 50 O.S. 2d, 63 "

"Whether the docket-clearing function of Rule 4(E) is necessary may be questioned. As noted the rule applies only to in-states cases. In a busy municipal court, clearing the docket of many neglected, poorly prosecuted small cases may be beneficial from the standpoint of efficient judicial administration. On the other hand, if a case is dismissed without prejudice pursuant to Rule 4(E) six months after the complaint is filed and the statute of limitations in the cause has run, the dismissed plaintiff will have at least one year to file over again under the savings statute, RC Section 2305.19. In short, in light of a Rule 4(E) dismissal the plaintiff will have longer to perfect service of process than would be possible under the one-year limitation of Rule 3(A)."

The Supreme Court of Ohio stated that it was "unfortunate that this case (Goolsby) demands resolution of a situation that would have been avoided had the Civil Rules been applied by the trial court below." In other words, the

Goolsby case was decided upon the improper use of Civil Rule 3(A) to void the Savings Statute and dismiss the second Complaint. Goolsby had nothing whatsoever to say about whether a 3(A) dismissal would have been proper after one year had expired without service after the filing of the initial Complaint. Goolsby did say, however, that the initial Complaint should have been dismissed, sua sponte under Ohio Civil Rule 4(E), as service was not made upon the Defendant within six months after the filing of the Complaint.

Consequently, the purpose of Ohio Civil Rule 3(A) at Saunders v. Choi (1984), 12 Ohio St. 3d, 247 is:

Among other things, the purpose of Civ.R. 3(A) is designed to promote the prompt and orderly resolution of litigation, as well as eliminating the unnecessary clogging of court dockets caused by undue delay. The rule puts litigants on notice that a reasonable time will be afforded in order to obtain service of process over defendants. Such a rule goes to the essence of civil procedure and is not, in our view, a mere

technicality designed to deny parties their day in court.

As in the instant case, a plaintiff is the master of his or her cause of action. The failure of a plaintiff to comply with rules promulgated under our uniform modes of procedure should not compel this court to carve out a limited exception in order to grant such a litigant another opportunity to do that which he failed to do in the first place. Saunders, supra, page 250 with emphasis.

Saunders is still the prevailing view. The decision was not disturbed nor distinguished in the Goolsby Supreme Court decision. Since Bank One used Goolsby solely as an example of the Supreme Court of Ohio's reliance upon Saunders, the August 28, 1991 holding in Goolsby should not be viewed as unfavorable. Further, Goolsby does not consider such issues as successive amendments to initial complaints and the consistent amenability of corporate bodies to service of process under Section 1701.07(H) of the Ohio Revised Code.

Having distinguished Goolsby, it is obvious that Ohio law regarding commencement and service has not been changed thereby. Goolsby addresses the very narrow issue of the preservation of an action under the Limitations and Savings Statutes, Ohio Revised Code Sections 2305.10 and 2305.19. In Goolsby, the Supreme Court of Ohio sought only to reverse the Goolsby Trial Court's inconsistent decisions regarding the aforementioned statutes based upon an improper application of Ohio Civil Rule 3(A).

CONCLUSION

Bank One failed to timely acquire service upon the O'Brien Entities. Pursuant to Ohio Civil Rule and case law, there was no actual notice of the suit to the entities and the trial court lacked authority to render any judgment against the O'Brien Entities. The trial court's judgment and the Tenth District Appellate Court's Decision, relying upon Goolsby, squarely conflicts with the requirement of notice and due process as required by Ohio Civil Rule 4 et seq., the

requirement of commencement as required by Ohio Civil Rule 3(A) and the application of the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution to these facts. The conflict between existing and valid Ohio case law and the Trial and Appellate Court Decisions, which were improperly ratified by the refusal of the Supreme Court of Ohio to exercise its discretionary power, is reasonable justification for these Petitioners to ask this Honorable Court to exercise its discretionary review powers and reverse the underlying Decisions.

No procedural or substantive due process has been accorded Petitioners and this case should be remanded to the Trial Court with instructions to dismiss for want of in personam jurisdiction, thereby eliminating future irreparable damage to other litigants who may rely upon the same Rules

and case law as did the O'Brien Entities.

Respectfully submitted,

Gina M. Dougherty (DOU 13)
Supreme Court No. 0022195
336 South High Street
Columbus, Ohio 43215
(614) 461-6300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Writ of Certiorari was served upon counsel for Plaintiff-Appellee, Bank One, Columbus, NA, Michael W. Donaldson, VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008; Counsel for Freedom Federal Savings and Loan, Nelson E. Genshaft, SCHWARTZ, KELM, WARREN & RUBENSTEIN, 41 South High Street, Columbus, Ohio 43215; and, Counsel for Merit Savings and Lyndon Guaranty Bank of Ohio, Thomas R. McGrath, MCGRATH, KAUFMAN, HATCHER, 175 South Third Street, Suite 1070, Columbus, Ohio 43215, by regular U.S. Mail, postage prepaid, this 3rd day of September, 1992.

Gina M. Dougherty (DOU 13)
Supreme Court No. 0022195

THE SUPREME COURT OF OHIO

1992 TERM

To wit: May 27, 1992

Bank One, Columbus, N.A., Appellee,	:	Case No. 92-440
v.	:	
Charles William O'Brien et al., Appellants.	:	E N T R Y

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Franklin County to certify its record. Upon consideration of appellee's motion to dismiss,

IT IS ORDERED by the Court that said motion to dismiss be, and the same is hereby, sustained.

IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

COSTS:

Motion Fee, $40.00, paid by Keila Weakley.

(Court of Appeals Nos. 91AP166 & 91AP441)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank One, Columbus, N.A.,	:	
Plaintiff-Appellee,	:	Nos. 91AP-166 and 91AP-441
v.	:	(REGULAR CALENDAR)
Charles William O'Brien and Karen Sue O'Brien et al.,	:	
Defendants-Appellees.	:	
(F&S Properties, WKH Corporation, HWK Corporation, HKW Properties, and Jasper Investment Corporation,	:	
Defendants-Appellants).	:	

OPINION

Rendered on December 31, 1991

VORYS, SATER, SEYMOUR AND PEASE, and MR. MICHAEL W. DONALDSON, for appellee Bank One, Columbus, NA.

MS. LUIGIA TENUTA, for appellants.

MR. CHARLES WILLIAM O'BRIEN, pro se.

SCHWARTZ, KELM, WARREN & RUBENSTEIN, MR. NELSON E. GENSHAFT and MR. D. DAVID CARROLL, for appellee Freedom Savings Association, F.A.

McGRATH, KAUFMAN, HATCHER CO., L.P.A., MR. THOMAS R. McGRATH and MR. ERIC J. WITTENBERG, for appellees Lyndon Guaranty Bank of Ohio and Merit Savings Association.

APPEALS from the Franklin County Court of Common Pleas.

PETREE, J.

Appellants, F&S Properties, WKH Corporation, HWK Corporation, HKW Properties and Jasper Investment Corporation, appeal from a judgment of foreclosure rendered by the Franklin County Court of Common Pleas in favor of appellee Bank One. The judgment on appeal was taken against

appellants by default pursuant to Civ. R. 37(B)(2)(c) as a sanction for their failure to attend depositions noticed by Bank One. In conjunction with the default judgment, the trial court also appointed a receiver to take possession and control of certain real property owned by appellants. From these judgments, appellants appeal, asserting the following assignments of error:

> "I. When an action is not properly commenced, under Ohio Civil Rule 3(A), upon a named defendant, the court lacks in personam jurisdiction. Any judgment rendered against such defendant is void ab initio.
>
> "II. Appellant-companies were denied due process of law when the trial court rendered a default judgment in foreclosure.
>
> "III. When an action has not been properly commenced against a party in interest by filing a complaint and obtaining service under the rules, the appointment of a receiver by the trial court is unauthorized and void.
>
> "IV. During the pendency of the appeal from a judgment entry and decree in foreclosure, an amended entry in foreclosure, issued by the trial court, is void for want of jurisdiction."

This action was brought by Bank One to obtain judgment and foreclosure on three notes and mortgage deeds executed by Charles William O'Brien and Karen Sue O'Brien. Appellants were first named as defendants in this suit in Bank One's first amended complaint filed on June 9, 1989. In this complaint, Bank One alleged that Charles William O'Brien has fraudulently executed and recorded releases of three mortgages held by Bank One. The complaint further alleged that, having fraudulently released Bank One's liens upon his property, O'Brien conveyed the property to appellants, five incorporated and unincorporated entities allegedly in his control. Personal service of the complaint was made upon three of the appellant-companies, WKH Corporation, HWK Corporation, and Jasper Investment Corporation, on May 7, 1990. Bank One was, however, unable to effect service on the remaining two companies. On June 22, 1990, Bank One moved for leave to file a second amended complaint. The amended complaint was identical to its predecessor in all material respects and its

explicit purpose was to obtain an additional year within which to commence an action against the remaining defendants under Civ. R. 3(A). Leave was granted by the trial court and Bank One filed the amended complaint on September 6, 1990. Service of the second amended complaint was then made upon F&S Properties and HKW Properties by publication.

In response to Bank One's complaint, appellants filed a motion to dismiss in which they asserted that the action had not been properly commenced against them under Civ. R. 3(A). This motion was not ruled upon by the trial court until January 18, 1991. In a judgment entry mailed on that date, the court denied the motion to dismiss and ordered that appellants file an answer within fourteen days. Adding three days for ordinary mail service under Civ. R. 6(E), appellants' answer was due on February 7, 1991. The trial in this matter was scheduled to go forward five days later on February 12, 1991.

On Friday, January 18, 1992, Bank One served notice that it would take the depositions of those persons designed by appellants to testify on their behalf on the following Wednesday and Thursday. No representative for the appellant-companies appeared at the scheduled depositions, but appellants' counsel did send Bank One a letter in which she expressed her understanding that the depositions had been canceled. Citing appellants' failure to attend the scheduled depositions, Bank One filed a motion for default judgment pursuant to Civ. R. 37(B)(2)(c) and (D). In that same motion, Bank One also sought a default judgment against O'Brien for reasons not relevant to this appeal. One day later the court issued notice that "should defendant O'Brien fail to comply [with the court's previous orders] on or before February 5, 1991 at 1:00 p.m. the court will consider the motion for default without further notice on Wednesday, February 7, 1991 at 11:00 a.m. ***. "When appellants' counsel failed to appear at the February 7 hearing, the court ruled that a default

judgment against appellants would be granted in favor of Bank One. A judgment to this effect was journalized on February 12, 1991. In this entry, the court also granted a default judgment against O'Brien, which judgment is the subject of a separate appeal in this court. Finally, in a separate judgment entry, the court appointed a receiver to take possession and control of fifteen parcels of real property owned by appellants and in which Bank One claimed an interest by virtue of this action.

I.

By their first assignment of error, appellants maintain that no judgment may be taken against them because the action was not properly commenced within one year as required by Civ. R. 3(A). That rule provides that "a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing ***." The record indicates that three of the appellant-companies were served within one year after they were first named in Bank One's first

amended complaint. We reject appellants' argument that the provisions of Civ. R. 15(A) in conjunction with Civ. R. 3(A) require that new-party defendants joined by an amended complaint be served with one year of the original, rather than the amended complaint. While there may be some question as to the date Bank One's action was commenced against these three companies, there can be no question that the action was, in fact, commenced under Civ. R. 3(A).

A more difficult problem is presented regarding the other two appellant-companies. The record reveals that Bank One did not complete service by publication upon F&S Properties and HKW Properties until October 19, 1990, well over a year after they were first named in the first amended complaint. Bank One maintains that it obtained an additional year within which to make service on appellants by virtue of its second amended complaint, filed on September 6, 1990. As appellants point out, this court previously rejected the precise argument advanced by Bank One in Back v. Souder (July 12,

1990), Franklin App. No. 89AP-627, unreported (1990 Opinions 2942). Nevertheless, we conclude that Back is no longer controlling on this issue in light of the Supreme Court's recent holding in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d 549.

In Goolsby, the plaintiff filed a complaint against a named defendant but instructed the clerk not to make service of the complaint. Seventeen months later, the clerk was instructed to and did make service within one year as required by Civ. R. 3(A), the court nevertheless held that the action had been properly commenced. In reaching this conclusion, the court adopted reasoning striking similar to that rejected by this court in Back, supra. Observing that the plaintiff could have obtained an additional year within which to make service by filing a voluntary notice of dismissal and then refiling the action, the Goolsby court held that an instruction by the plaintiff to attempt service is equivalent to refiling the cause of action for purposes of Civ. R. 3(A). Applying Goolsby to the

facts of this case, we hold that filing an amended complaint is also equivalent to refiling the complaint and that this action gave Bank One an additional year within which to make service under Civ. R. 3(A). Because F&S Properties and HKW Properties were served within one year after Bank One filed its second amended complaint, the action against them was properly commenced under Civ. R. 3(A).

The first assignment of error is not well-taken.

II.

In the second assignment of error, appellants maintain that the trial court erred and abused its discretion when it rendered a judgment of foreclosure by default against appellants pursuant to Civ. R. 37(B)(2)(c).

Civ. R. 37(B) authorized the court to impose a variety of sanctions where "*** a party fails to obey an order to provide or permit discovery ***." Possible sanctions include an award of reasonable expenses and attorney fees, an order prohibiting the introduction of designated matters into

evidence, and an order striking selected claims or defenses. In extreme cases, the court may dismiss the action or render judgment by default against the disobedient party. Although the selection of an appropriate remedy is a matter committed to the discretion of the trial court, the most drastic sanctions must be reserved for flagrant cases. American Housing Corp. v. Rhoades (1981), 1 Ohio App. 3d 130, 131. Because Ohio law favors the resolution of cases on their merits, the harsh remedies of dismissal and default should be imposed only where the failure to comply with the court's order is the product of willfulness or bad faith. Toney v. Berkemer (1983), 6 Ohio St. 3d 455, syllabus; Sedgwick v. Kawasaki Cycleworks, Inc. (1985), 24 Ohio App. 3d 109, 111. Where the circumstances do not warrant a finding of willfulness or bad faith, the trial court should consider the alternative sanctions set forth in Civ. R. 37(B)(2)(a), (b), and (d). On appeal, we review the trial court's choice of sanctions for an abuse of discretion. Ward v. Hester (1973), 36 Ohio St. 2d 38.

On our review of the record, we are convinced that the trial court abused its discretion when it granted a default judgment under these circumstances. As it is the most severe remedy available under Civ. R. 37(B)(2)(c), a judgment by default may be rendered only upon a finding that the party's non-compliance with the court's ordered or the rules of discovery is willful or in bad faith. In this case, there is simply no evidence which would warrant such a finding. Appellants did not simply fail to attend the depositions without explanation. On the contrary, appellants explained that they thought the depositions had been canceled in accordance with Bank One's prior correspondence. The correspondence referred to is a cover letter mailed by Bank One with the deposition notices. In that letter, Bank One stated if the trial date was to be continued past January 28 - a near certainty since appellants' motion to dismiss was not ruled upon until January 18 - Bank One would withdraw the enclosed notice to take appellants' depositions. One day prior to the transmission of

this correspondence, the assignment office had, in fact, issued notice continuing the trial date to February 12, 1991. As Bank One suggests, appellants should not have simply assumed that the depositions had been canceled, but such a lapse in judgment does not quite constitute willful or dilatory conduct warranting the imposition of a default judgment.

The fact that appellants' counsel failed to make a timely appearance at the February 7 hearing also does not warrant a judgment by default. It is well-established in this appellate district that the mere failure to attend a scheduled hearing is not grounds for a judgment of dismissal or default absent some other showing of dilatory or irresponsible conduct. Nicol v. Ever-Dry Waterproofing, Inc. (1987), 37 Ohio App. 3d 106; American Housing Corp., supra. Furthermore, in such cases we have required that the court give advance notice before dismissing a case based on a party's failure to attend a trial or hearing. Ford Motor Credit Co. v. Potts (1986), 28 Ohio App. 3d 93. Finally, the transcript of the February 7 hearing

indicates that counsel for appellants did, in fact, appear at the hearing though she was apparently ten minutes late. Whether or not a default judgment might be granted based upon appellants' total failure to appear at the hearing, it is clearly an abuse of discretion to grant a default judgment because counsel was a few minutes late.

We note that appellants are represented separately from their co-defendant, Charles William O'Brien. In considering this appeal, we have taken special care not to confuse appellants' conduct with the contemptuous and reprehensible behavior of their co-defendant. Although Bank One asserts that appellants are either owned or controlled by O'Brien, there is no proof supporting this allegation. Until it is shown that the appellant-companies are mere shams formed for the purpose of perpetrating a fraud or that they are wholly owned and controlled by O'Brien, the court may not impose sanctions against appellants for O'Brien's conduct. Cf., Sedwick, supra; Anderson v. Air West, Inc. (C.A.9, 1976), 542 F.2d 1090. On

the record before us, we find the entry of a default judgment to be an abuse of discretion.

The second assignment of error is well-taken.

III.

In the third assignment of error, appellants assert that the trial court erred in appointing a receiver to take charge of property owned by appellants. The appointment of a receiver is governed by R.C. 2735.01. That section provides that a receiver may be appointed in the following circumstances:

> "(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;
>
> "(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been

performed, and the property is probably insufficient to discharge the mortgage debt[.]"

In granting Bank One's motion for the appointment of a receiver, the trial court apparently relied on sections (A) and (B), finding that the property or fund was in danger of being lost, removed, or materially injured and that the property was probably insufficient to discharge the mortgage debt. The trial court's decision to appoint a receiver will not be disturbed absent an abuse of discretion. State, ex rel. Celebrezze v. Gibbs (1991), 60 Ohio St. 3d 69, 73. Nevertheless, there must be some evidence of record tending to prove the facts essential to the order. Where a finding necessary to support the appointment of a receiver under the statute is not supported by any evidence in the record, an abuse of discretion occurs and the order must be reversed. Malloy v. Malloy Color Lab, Inc. (1989), 63 Ohio App. 3d 434, 436.

After reviewing the record in this case, we find a complete absence of evidence to support either of the court's

findings. The briefs and memoranda of the parties are not evidence. The only affidavit in the file merely states "[t]hat depending upon this court's determination of the priority of mortgages upon the subject property, the value of such property may be insufficient to discharge the mortgage debt of Bank One." The affidavit does not set forth any facts to support this statement, nor does the conclusion that the property "may be insufficient" meet the applicable standard that the "property probably is insufficient to discharge the mortgage debt." Furthermore, there is simply no evidence supporting the court's finding that the property was in danger of being lost, removed or materially injured. Because there is no evidence to support the appointment of a receiver under R.C. 2735.01(A) and (B), the court abused its discretion in granting Bank One's motion for the appointment of a receiver.

A receiver was also appointed upon the motion of three other parties with regard to whom no final judgment had been rendered when this appeal was taken. However, because the

appointment of a receiver is a final appealable order, we proceed to consider the motions filed by Merit Savings Association, Lyndon Guaranty Bank, and Freedom Savings Association. Each of these motions asserted that a receiver should be appointed without regard to the provisions of R.C. 2735.01, based upon the terms of the mortgage agreements executed by appellants. While we agree that a receivership can be awarded upon the terms of a contractual agreement, e.g., Federal Land Bank v. DeRan (1944), 74 Ohio App. 365, no agreement to this effect was ordered as evidence in this action. It is an abuse of discretion to appoint a receiver based upon a purported agreement which is not properly submitted in evidence, by affidavit or otherwise.

The third assignment of error is well-taken.

IV.

Finally, in the fourth assignment of error, appellants challenge the validity of an amended judgment entry filed by

the court on March 12, 1991, some thirty days after this appeal was filed. On Bank One's motion, the trial court corrected an omission in the original judgment entry by attaching to it an exhibit which specifically set forth the deeds to be set aside as directed by the judgment. The amendment effected no substantive change in the judgment entry.

Appellants contend that the amended judgment entry must be held null and void because the trial court was divested of jurisdiction to modify or correct the judgment during the pendency of this appeal. For this proposition, appellants rely on the judgment of the Cuyahoga County Court of Appeals in Vavrina v. Greczanik (1974), 40 Ohio App. 2d 129. That court held that a trial court lacks jurisdiction to act on a motion for relief from judgment filed pursuant to Civ. R. 60(B) during the pendency of an appeal. This court has, however, declined to follow the reasoning set out in Vavrina and its progeny. Eg., Stickney v. Ervin (Dec. 5, 1989), Franklin App. No. 89AP-616, unreported (1989 Opinions 4596); In Re Estate of Davis (Dec.

20, 1979), Franklin App. No. 79AP-731, unreported (1979 Opinions 4089). Instead, we have held that a trial court retains jurisdiction to consider a motion for relief from judgment filed under Civ. R. 60(B) during the pendency of an appeal because such a determination does not interfere with our jurisdiction to proceed with the appeal. See In Re Kurtzhalz (1943), 141 Ohio St. 432, Similarly, a trial court is not divested of jurisdiction to correct a judgment entry during the pendency of an appeal pursuant to Civ. R. 60(A). While that rule states that a trial court should obtain leave of the appellate court before correcting a judgment in which an appeal is pending, the failure to do so does not oust the trial court of jurisdiction; it merely constitutes an error reviewable on appeal. In this case, the error is non-prejudicial because the trial court's correction of the judgment entry in no way interfered with our jurisdiction and we would have granted leave had such a motion been filed.

The fourth assignment of error is not well-taken.

For the foregoing reasons, appellants' second and third assignments of error are sustained, and the first and fourth assignments of error are overruled. The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion and in accordance with law.

Judgment reversed and
cause remanded.

STRAUSBAUGH and BRYANT, JJ., concur.

Supreme Court

CASE #92 535

IN THE

SUPREME COURT OF THE UNITED STATED

OCTOBER TERM, 1992

CHARLES WILLIAM O'BRIEN

(F & S PROPERTIES),
(WKH CORPORATION),
(HWK CORPORATION),
(HKW PROPERTIES),
(JASPER INVESTMENT CORPORATION),

Petitioner

v.

BANK ONE, COLUMBUS, N.A.

Respondent

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

THOMAS R. MCGRATH
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October, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ohio Civil Rule 3(A) commencement requirement that service be obtained within one (1) year of filing in order to properly commence an action is extended by the filing of an Amended Complaint, and, thus, accords due process.

2. Whether refusal to mail court filings and/or refusal to re-mail court filings by ordinary mail after certified mail of such filings have been returned to opposing counsel as "unclaimed", constitutes notice of such filings sufficient to accord the affected party due process.

THE PARTIES

The parties are Petitioner, Charles William O'Brien, Petitioners, F&S Properties, WKH Corporation, HWK Corporation, HKW Properties, and Jasper Investment Corporation, Respondents, Bank One, Columbus, N.A., Respondents Merit Savings Association, Lyndon Guaranty Bank of Ohio, and Respondent, Freedom Federal Savings & Loan Association.

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OPINIONS BELOW

The prior opinion most pertinent to the pending Petition and the judgment under review is the December 31, 1991 decision of the Tenth District Court of Appeals of Ohio, Bank One, Columbus, N.A. vs. Charles William O'Brien, et al., 91 AP 165; 91 AP 440. A petition for discretionary review was denied by the Supreme Court of Ohio on June 24, 1992. The decision under review and the order denying review are reproduced in the Appendix of this Brief.

JURISDICTION INVOKING THIS COURT'S JURISDICTION

None of the arguments set forth herein invoke this Court's jurisdiction pursuant to the provisions of Rule 17 of the Revised Rules of the Supreme Court of the United States, nor do they invoke this Court's jurisdiction pursuant to either the United States Constitution or any statute promulgated thereunder. All issues raised herein are matters of state law which have been fully and properly adjudicated by the Courts of the State of Ohio. Absent a federal question, this Court has no jurisdiction over this Petition. See, e.g. Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 90 L.Ed. 897, 75 S.Ct. 614 (1955).

STATEMENT OF THE CASE

Bank One, Columbus, N.A. ("Bank One") filed its Complaint on March 18, 1989, against Petitioner Charles William O'Brien ("O'Brien") and his wife Karen Sue O'Brien, and obtained judgment on three (3) cognovit notes. Said judgment was vacated on June 7, 1989, and Bank One was permitted to file its First Amended Complaint.

Bank One's First Amended Complaint added as defendants, Merit Savings Association ("Merit"), Lyndon Guaranty Bank of Ohio ("Lyndon") and Freedom Federal Savings Association ("Freedom"), which were additional lenders to all Petitioners, and also added F&S Properties, WKH Corporation, HWK Corporation, HKW Properties and Jasper Investment Corporation (collectively the "Entities") as defendants. The additional loans

made by Merit, Lyndon and Freedom to the O'Briens and the Entities were collateralized by the same properties previously given as collateral by the O'Briens to Bank One to secure Bank One's loans and evidenced by the three (3) cognovit notes subject to this litigation. Merit and Lyndon filed their Answers to Bank One's First Amended Complaint on July 10, 1989. Subsequently, when their loans went into default, Merit and Lyndon obtained leave and filed Crossclaims against O'Brien and the Entities, seeking foreclosure of the properties, a determination of the priority of all liens, and also an Order that the properties be sold and the proceeds applied to reduce Merit and Lyndon's obligations.

Bank One obtained leave and filed its Second Amended Complaint on Septem-

ber 6, 1990. Merit and Lyndon filed their Answers and Crossclaims to the Second Amended Complaint, which were identical to the First Answers and Crossclaims in the Federal District Court, Southern District of Ohio, Eastern Division, because O'Brien improperly had attempted to remove the case. The case was remanded to the Franklin County Court of Common Pleas by the District Court, whereupon Merit and Lyndon refiled their Answers and Crossclaims in the Court of Common Pleas, even though the trial court had ruled that the Federal Court filings already were properly before the court. On February 12, 1991, the trial court entered a default judgment against O'Brien, Karen Sue O'Brien and the Entities in favor of Bank One. Merit and Lyndon obtained default judgments against Karen Sue

O'Brien that same day, and then obtained summary judgment against O'Brien and the Entities on July 26, 1991.

In the various lenders' attempts to collect on their obligations, and their efforts to foreclose on the properties subject to the mortgages in this matter, because of O'Brien's approach, this litigation has dragged needlessly on for more than three and one half (3-1/2) years, has required a substantial amount of several courts' time with the filing of well over 500 pleadings and motions in the trial court, 90 pleadings and motions in the United States District Court, Southern District of Ohio, (many of which were found to be frivolous), numerous frivolous interlocutory appeals by O'Brien to the Court of Appeals of Ohio, to the Ohio Supreme Court and appeals to the United States Court of Ap-

peals for the Sixth Circuit and now to this Court.

In order to spare the Court the agony of relating the tortured history of this litigation, Respondents Merit and Lyndon will simplify the issues before this Court by explaining that the underlying basis of this litigation was Bank One's attempt to obtain judgment and foreclosure on three (3) mortgage notes and deeds executed by Charles William O'Brien and Karen Sue O'Brien in its favor.

Once the O'Briens defaulted on the Bank One mortgages, Bank One prepared to foreclose by filing a Complaint on its cognovit notes. While Bank One was preparing to foreclosure upon its cognovit judgment, O'Brien filed a Motion for Relief from Judgment pursuant to the provisions of Ohio Civil Rule

60(B), which Motion was granted. Accordingly, Bank One performed a title search, and discovered that, prior to the recording of a number of fraudulently altered mortgage releases in January, 1987, the O'Briens had proceeded, in 1986, to convey title to all the properties subject to Bank One's mortgage to the Entities. Subsequently, the O'Briens caused the Entities to apply for and obtain loans from Merit, Lyndon and Freedom, all of which are defendants in the action. These loans were secured by first and second mortgages on the properties, with Merit and Lyndon's being first liens on their subject properties, Bank One's mortgages having been released by operation of the fraudulently altered releases.

Throughout the pendency of the lower court action, Petitioners have con-

tended that, pursuant to an extremely technical interpretation of Ohio Civil Rule 3, the First and Second Amended Complaints filed by Bank One were not timely served, and that, as a result, the Franklin County Court of Appeals erred in affirming the judgment entered against them in its Opinion in Cases #91 AP 165 and #91 AP 440 (consolidated).

Despite the fact that these solely are issues of state law, which have been fully adjudicated by the relevant state courts, and do not raise issues of great general interest or constitutional importance, Petitioners seek relief from this Court. However, as Petitioners' own conduct has been the cause of their problems, this Court should not sanction their efforts to further delay these proceedings by petitioning this Court.

It should be noted that Question #2 presented for review by Petitioners does not apply to either Merit or Lyndon, and accordingly, neither Merit nor Lyndon will respond to it.

LAW AND ARGUMENT

1. PETITIONERS' PETITION FOR WRIT OF CERTIORARI IS NOT IN COMPLIANCE WITH THE PROVISIONS OF EITHER RULE 14 OR RULE 33 OF THE RULES OF THIS COURT.

It should be noted that the Petition is thirty nine (39) pages in length, and subject to denial pursuant to the provisions of Rule 14.5. Further, it should be noted that the Petition for Writ of Certiorari is not in compliance with the requirements of Rule 33.1(E), in that the size of the typed matter exceeds the 4-1/8" x 7-1/8" requirement in that the text of the Petition measures 4-1/2" x 6-1/2". Again, and pursuant to the provisions of Rule 14.5, this is grounds for denial of the Writ.

Last, Petitioners' Petition fails to set forth grounds for this Court to accept jurisdiction on Writ of

Certiorari, as set forth in Rule 10.1.

2. ALL PARTIES TO THE LITIGATION WERE PROPERLY SERVED UNDER OHIO CIVIL RULE 3(A), AND HENCE, THE TRIAL COURT HAD PROPER JURISDICTION OVER ALL PARTIES. ACCORDINGLY, THE TRIAL COURT'S ENTRIES OF JUDGMENT SHOULD BE AFFIRMED.

The Entities contend that the trial court lacked jurisdiction over the parties to this litigation. Their argument for lack of jurisdiction claims that Bank One failed to effectuate service within one (1) year of filing its Complaint, pursuant to Rule 3(A). As more fully set forth below, said arguments are not well-taken and must fail.

The original Complaint, filed by Bank One, was filed on March 17, 1989. This Complaint sought judgment on cognovit notes signed by Charles William O'Brien and Karen Sue O'Brien. There was no reason for the Entities, Freedom,

Merit or Lyndon to be parties to the initial Complaint. Judgment on the cognovit notes was entered in favor of Bank One on March 17, 1989. Subsequently, O'Brien filed a Rule 60(B) Motion for Relief from this judgment. At this time, Bank One learned of the existence of the Entities and of the loans made by Merit, Freedom and Lyndon, and by leave of the trial court, amended its Complaint to include the Entities and the other lenders as parties. Leave to amend the Complaint, as well as O'Brien's Rule 60(B) motion were granted on June 7, 1989. On May 8, 1990, notice of receipt of personal service of summons on HWK Corporation, WKH Corporation and Jasper Investment Company was filed. On June 7, 1989, Merit's cross-claim was properly served.

Service of summons on HKW Corporation, WKH Corporation and Jasper Investment Company was proper. Civil Rule 3(A) is not applicable to this situation because it allows amendments to relate back to the original complaint when the statute of limitations has expired, provided certain requirements are met. Civil Rule 4, on the other hand, determines when an action is commenced, and allows the use of Rule 15(C) only when the defendant is incorrectly named. This is not the situation in the instant case, as the unusual circumstances involved in this case required the addition of parties, not the correction of any misnaming of defendants. Hence, the amended complaints do not relate back to the original complaint, since they deal with different substantive matters.

Additionally, the Entities' arguments that the initial action was not commenced against all parties within the one year requirement of Civil Rule 3(A) must fail for other reasons. Rule 3(A) provides in relevant part:

> A civil action is commenced by filing a complaint with the Court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Rule 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Rule 15(D).

The staff notes to Civil Rule 3(A) provide:

> ...The service within one year requirement is retained from Section 2305.17, R.C., as amended in 1965, and is based on the philosophy that dockets should be cleaned if, within réasonable time within one year, service has not been obtained.

O.R.C. 2305.17 provides:

> An action is commenced within the meaning of Sections 2305.03 and 2305.22, inclusive and Sections 1302.98 and 1304.29 of the Revised Code, by filing a petition in the office of the clerk of the proper court, together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.

It is interesting to note that Civil Rule 3(A) does not exclude amended complaints. This construction of Civil Rule 3(A) is in accord with Civil Rule 1(B), which provides:

> (B) Construction. <u>These rules shall be construed and applied to effect just results by eliminating delay</u>, unnecessary expense and all other impediments to the expeditions administration of justice. (emphasis added)

The staff notes to Civil Rule 1(B) state:

> Rule 1(B) Construction:
>
> Rule 1(B) states that these rules shall be construed and applied as to facilitate the expeditious administration of

> justice. Hence, emphasis is placed upon the liberal construction rather than upon technical interpretation.

If Petitioners' incredibly technical interpretation of Rule 3(A) is accepted, the result would not promote "the expeditious administration of justice", and would reward the Petitioners' bad faith and dilatory tactics, which are amply demonstrated in the record. Further, it is an established maxim of law that whenever possible, cases should be adjudicated on their merits and not on procedural issues. If Civil Rule 3(A) is liberally construed as required by Civil Rule 1(B), expeditious administration of justice based on the merits of the case will result, and Petitioners' bad faith and dilatory tactics will not be rewarded.

Indeed, Civil Rule 3(A)'s stated philosophy is to clear dockets; however,

the technical construction of Civil Rule 3(A) advanced by Petitioners' would circumvent justice in the instant case by forcing the lenders to go back and start over again, and would also contradict the policy and requirements of Civil Rule 1(B). Only a liberal construction of Civil Rule 3(A) facilitates the "expeditious administration of justice", as encouraged by Civil Rule 1(B)'s staff notes. Petitioners seek an inflexible and technical interpretation of the rules in the hopes of further delaying the orderly progress of this litigation.

> A purely technical application of Civil Rule 3(A) would result in a finding that Goolsby had not commenced her action, despite the fact that the first complaint was filed and a demand for service was made within the limitations period prescribed by statute. Yet, it is not disputed that had Goolsby dismissed her com-

> plaint and again filed it at the time when instructions for service were given, the action would have been commenced according to Civil Rule 3(A). We believe that under these circumstances the Civil Rules should not require a plaintiff to refile...Such an exercise could not be said to "effect just results by eliminating delay, unnecessary expenses and all other impediments to the expeditious administration of justice.

Goolsby v. Anderson Concrete Corporation, 61 Ohio St. 3d 549, 550 (1991).

Sirower v. Club South Investments Co., Inc., Case #88 AP 169 (Franklin County 1988, unreported), heavily relied upon by the Entities, is easily distinguishable from the instant case. In that case, the Court was faced with a $900 default judgment taken on August 14, 1986, but where service was not completed until September 22, 1987. In Sirower, the Plaintiff failed to seek leave to file an amended complaint, as

Bank One did here. Further, Sirower did not address the issue raised here: whether the filing of an amended complaint with leave of court pursuant to Civil Rule 15(A) extends the one year period for obtaining service to the date of the filing of the amended complaint. The other cases relied upon by the Petitioners, Maryhew v. Yova, 11 Ohio St. 3d 154, 464 N.E. 2d 538 (1984) and Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E. 2d 642 (1977) also fail to reach this question. Thus, both are distinguishable, and are inapplicable to the instant case. Further, the Ohio Supreme Court's recent decision in Goolsby, as set forth above, disposes of this argument.

Since both the applicable case law and the Civil Rules allow service to be effectuated within one year of the fil-

ing of the Amended Complaint, proper service was effectuated on O'Brien, Karen Sue O'Brien and the Entities well within the one year time limit. Hence, the trial court had jurisdiction over all the parties to this litigation, and its judgment should be upheld.

Bank One instructed the clerk to serve Karen Sue O'Brien, F&S Properties and HWK Corporation. On August 3, 1989 service by certified mail failed. On February 27, 1989, personal service failed. On April 9, 1990 ordinary mail service on the Entities, c/o Tammy M. Cordell, statutory agent, failed, and finally on April 25, 1990 service by publication failed. Bank One aggressively attempted to serve the three parties who had not been served as of June 7, 1990. These attempts to serve the parties beyond the statutory limit of

the filing of the original complaint on the cognovit notes were proper.

Proper service to commence an action must occur within one year of the date of that action was filed, or one year from the date of the action was refiled, if refiled within the original one year limit. Goolsby v. Anderson Concrete Corporation, 61 Ohio St. 3d 549 (1991).

In Goolsby, the request for service was not made until two days prior to the end of the one year statutory limit. Service was obtained four days after the one year limit expired. The court held that a strict, technical application of Rule 3(A) would cause harsh and inefficient results for the party suffering the burden of this rigid application of Rule 3(A), who would nevertheless be free to file the same action again.

Adhering to the efficiency requirements promulgated by Rule 1(B), the Court held:

> [W]hen service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within the rule would provide an additional year within which to obtain service and commence the action under Civil Rule 3(A), an instruction to attempt service on the complaint would be equivalent to a refiling of the complaint".

Goolsby, 61 Ohio St. 3d at 551. This strict technical application of Rule 3(A), expressly rejected by the Ohio Supreme Court in Goolsby, is identical to the argument advanced by the Entities herein.

Accordingly, Bank One need not have requested leave to file a second amended complaint. The April 25, 1990 request for service, which was well within the one year limit of the filing of the pre-

ceding First Amended Complaint, extended the statutory limit to April 25, 1991. Prior to this date, the Entities responded to the Amended Complaint by filing a motion in Federal District Court to request further time to move or plead by Karen Sue O'Brien, F&S Properties and HWK Corporation. Furthermore, the successful personal service on the Entities on May 8, 1990 properly commenced the action. If service is obtained within one year of filing the Complaint, the case is commenced on the date of that filing for the purposes of the statute of limitations. However, where service is obtained more than one year after the filing of the complaint, then the case is deemed commenced on the date service is obtained. St. Thomas Hospital v. Beal, 2 Ohio St. 3d 132, 443 N.E. 2d 504 (1981).

Petitioners contend that the trial court had no jurisdiction to proceed, citing State, ex rel. Ballard v. O'Donnell, 50 Ohio St. 3d 182, 553 N.E. 2d 650 (1990). In Ballard, the Court held that in order for a court to acquire jurisdiction, proper service or an appearance must be made. The Petitioners conveniently forget that they made an appearance in the District Court on November 19, 1990. Hence, this argument must fail.

Since both the applicable case law and the Civil Rules allow service to be effectuated within one year of the filing of the Amended Complaint, and its accompanying request for service, service was effectuated upon Charles William O'Brien, Karen Sue O'Brien and the Entities well within the one year limit. Therefore, the trial court had

jurisdiction over all the parties, and the First Proposition of Law is meritless.

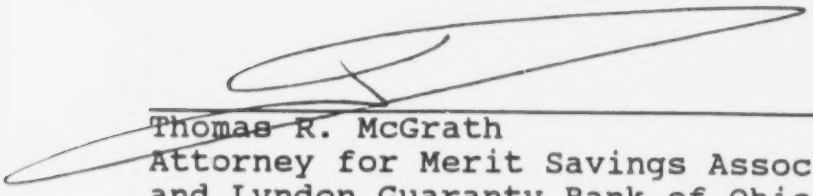
CONCLUSION

As set forth above, the state courts of Ohio have properly disposed of Petitioners' arguments while sending them a strong message that their bad faith dilatory conduct and their contempt of the courts of the State of Ohio will not be tolerated. This Court's acceptance of jurisdiction over this Petition for Writ of Certiorari would be tantamount to rewarding Petitioners for their bad faith and dilatory conduct, a precedent that this Court surely does not want to set. Accordingly, and for the reasons set forth herein, Respondents Merit Savings Association and Lyndon Guaranty Bank of Ohio respectfully request that this Court refrain from granting the Petition for Writ of Certiorari, and that it affirm the deci-

sions of the State courts of Ohio.

Respectfully Submitted,

McGrath, Kaufman & Hatcher Co., L.P.A.



Thomas R. McGrath
Attorney for Merit Savings Association
and Lyndon Guaranty Bank of Ohio
175 South Third Street, Suite 1070
Columbus, Ohio 43215-5141
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing Joint Brief in Opposition to Writ of Certiorari was mailed, regular U.S. mail, postage prepaid, to Charles William O'Brien, Post Office Box, 8369, Columbus, Ohio 43201; Lee C. Mittman, Attorney for Karen Sue O'Brien, 65 South State Street, Columbus, Ohio 43215; Gina Dougherty, Attorney for WKH Corporation, HWK Corporation, HKW Properties and Jasper Investment Corporation, 336 South High Street, Columbus, Ohio 43215; Nelson E. Genshaft, Attorney for Freedom Federal Savings & Loan Association, 41 South High Street, Columbus, Ohio 43215; Michael W. Donaldson, Attorney for Plaintiff and Third-party Defendants, 52 East Gay Street, Columbus, Ohio 43216-1008; Mr. Guttermaker

Co., Inc., 4482 Johnstown Road, Gahanna, Ohio 43230; The First Federal Savings Bank, c/o Kirk Sampson, 120 East Fourth Street, Cincinnati, Ohio 45202-4007; Luke A. Meadows, 1367 Republic Avenue, Columbus, Ohio 43211; Ralph E. Dill, 37 West Broad Street, Suite 950, Columbus, Ohio 43215; and Wilcox & Schlosser Co., L.P.A., 4937 West Broad Street, Columbus, Ohio 43228; on this 21st day of October, 1992.

Thomas R. McGrath
Attorney for Merit Savings Association
and Lyndon Guaranty Bank of Ohio

(3)

No. 92-535

FILED
OCT 26 1992
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Charles William O'Brien

(F & S Properties),
(WKH Corporation),
(HWK Corporation),
(HKW Properties),
(Jasper Investment Corporation),

Petitioner,

vs.

Bank One, Columbus, N.A.,

Respondent.

Petition For A Writ Of Certiorari To
The Supreme Court
Of The
State Of Ohio

Brief Of Respondent

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October, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

1. Whether the Ohio Civil Rule 3(A) commencement requirement that service be obtained within one year of filing in order to properly commence an action is extended by the filing of an Amended Complaint and, thus, accords due process.

2. Whether refusal to mail court filings and/or refusal to re-mail court filings by ordinary mail after certified mailing of such filings have been returned to opposing counsel as "unclaimed," constitutes notice of such filings sufficient to accord the affected party due proces.

THE PARTIES

The parties are Petitioner, Charles William O'Brien and Bank One, Columbus, N.A. (its parent company is Banc One Corporation and its only non-wholly owned subsidiary is Banc One Compensation Services Corporation).

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OPINIONS DELIVERED IN THE CASE

Petitioner incorrectly refers to the 10th District Court of Appeals of Ohio. The Court's proper name is the Court of Appeals of Ohio, Tenth Appellate District, as noted on its Opinion. Petitioner's Appendix A-2.

JURISDICTION

Petitioner incorrectly refers to 28 U.S.C., Section 1257(3). Presumably, Petitioner intended 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Petitioner incorrectly refers to Ohio Civil Rule 5(A) because it is not a constitutional provision.

STATEMENT OF THE CASE

A. Facts Material to the Consideration of the Questions Presented.

Petitioner fails in his Petition to follow Rule 14.1(g) of this Court which mandates a *concise* statement of facts *material* to the consideration of the questions presented. Respondent, pursuant to Rule 15.1 of this Court, will address "perceived misstatements of fact or law" by Petitioner and will include material facts omitted by Petitioner.

The first note was executed in 1980 not 1990. Respondent did not "unilaterally" attach property descriptions to Mortgage Deeds after they were signed or "without the consent,

permission or knowledge" of Petitioner. Said descriptions were attached to the Mortgage Deeds with the consent of Petitioner. The Trial Court record contains only Respondent's substantive evidence on this and all of the following matters because Petitioner failed, despite numerous Court orders, to provide discovery. See Court of Appeals Opinion, Appendix A-6 through A-12 to Petition.

In June, 1982, Petitioner requested and was provided with a second set of releases because he stated that he had not received the first set. Further, both sets of releases listed only the one property. Petitioner kept one set of releases and in January, 1987, filed and recorded them containing after the legal description "and all other premises set forth on Schedule A attached hereto." Schedule A contained the legal descriptions of all the mortgaged properties.

The transfers of the mortgaged properties in late 1986 by Petitioner were made without the knowledge or consent of Respondent. Similarly, the filing and recording of the releases in January, 1987, were made without the knowledge or consent of Respondent.

Respondent never accepted checks representing payments in full. Respondent followed its general policy of applying all payments to the oldest obligation first.

The first *material* fact is that Respondent did file for and obtain judgment on the three cognovit notes on March 17, 1989. Service was obtained on Petitioner who filed a motion for relief from judgment on April 5, 1989. Respondent ran title, discovered the December, 1986, transfers to the five entities of Petitioner, the January, 1987, releases and the subsequent mortgages to other lenders. On June 7, 1989, with leave of Court Respondent's Amended Complaint was deemed filed.

Respondent's service attempts for the Amended Complaint were delayed by Petitioner's affidavit of prejudice against the trial judge, interlocutory appeals, February 27, 1990, Petition for Writ of Certiorari to this Court and requested stay of proceedings pending appeals. Between April 9, 1990, and May 8, 1990, Respondent obtained service on three of Petitioner's corporate defendants. When Respondent filed for service by publication on the remaining three defendants, Petitioner faxed his May 11, 1990, threatening letter. See copy attached hereto as Appendix A-1 through A-3. Petitioner filed a second affidavit of prejudice on June 4, 1990, and the trial judge recused herself. On June 22, 1990, Respondent moved for leave to file its Second Amended Complaint. On September 5, 1990, leave to file was granted, and filing occurred on September 6, 1990, with a request for service by publication on the three defendants remaining to be served.

The second trial judge on September 12, 1990, scheduled a pretrial and motions' hearing for September 21, 1990. Respondent began service of pleadings on Petitioner by certified mail after Petitioner claimed not to have received a major package of motions mailed on September 17, 1990. On September 18, 1990, Petitioner filed his third affidavit of prejudice. On September 20, 1990, the Supreme Court of Ohio denied the third affidavit of prejudice and Petitioner filed his Notice of Removal to Federal Court. On September 25, 1990, Respondent filed its motion to remand. On November 19, 1990, the three defendants served by publication requested from the Federal Court extensions of time to move or plead.

On December 5, 1990, the case was remanded. See Court of Appeals Opinion, Appendix A-30 and A-31 to Petition. On December 10, 1990, Petitioner filed an appeal of the remand. On December 21, 1990, Petitioner filed his fourth affidavit of

prejudice--this one against the federal judge. On December 31, 1990, Petitioner filed a Complaint in Federal Court against the Ohio trial judge, counsel for Respondent, the Chief Justice of the Supreme Court of Ohio and several others.

At a January 4, 1991, hearing, the trial judge instructed service of all filings upon Petitioner by regular mail and Respondent complied. On January 17, 1991, Petitioner filed his fifth affidavit of prejudice--the second against the second trial judge. On February 7, 1991, Respondent was granted a default judgment against Petitioner for his failure with respect to discovery.

Petitioner incorrectly states at page 10 of his Petition that the Court of Appeals' decision was rendered on December 17, 1991, when it was actually rendered on December 31, 1991. Further, Petitioner incorrectly states at page 11 of his Petition that "as a direct result of the failure to receive the various pleadings in the case, Charles William O'Brien was defaulted for his alleged failure to comply with discovery orders predicated upon *unserved filings*." Petitioner was ordered on May 18, 1990, July 27, 1990, January 18, 1991, and January 30, 1991, to provide complete and non-evasive answers to Respondent's eight interrogatories. On February 6, 1991, Petitioner faxed a single page response objecting to the first question as to his wife's address and denying any knowledge on the other questions related to his entities. See Court of Appeals Opinion, Appendix A-5 through A-12 to Petition. None of these orders or motions requesting them were filed during the certified mail period from September 17, 1990, to January 4, 1991, during which time Petitioner still received at his address copies of all filings addressed to his wife and two of his non-corporate entities, and the counsel for his three corporate entities also received copies.

B. State in the Proceedings Where Federal Questions Were Raised.

Petitioner has failed under Rule 14.1(h) of this Court by not specifying the stage in the proceedings, both in the Trial Court and in the Appellate Court, at which the federal questions sought to be reviewed were raised; the method and manner of doing so and the way in which those Courts ruled; and pertinent quotations to show that the federal questions were timely and properly raised as to give this Court jurisdiction to review the judgment on a writ of certiorari.

REASONS WHY THE CASE SHOULD NOT BE REVIEWED BY THIS COURT

Pursuant to Rule 15.2 of this Court, Respondent submits that this Court should not review this case because of the blatant misstatement of facts and omissions of material facts by Petitioner. Additionally, Petitioner fails to comply with Rule 14.1(h) of this Court requiring him to show that any federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Further, Petitioner fails under Rule 14.1(j) to include in his Petition a direct and concise argument of the reasons to allow the writ with reference to Rule 10. Petitioner further fails under Rule 10 of this Court to articulate any "special and important reasons" to grant the Petition. Petitioner fails under Rule 10.1(b) to show in the instant case that the Supreme Court of Ohio has decided a federal question in a way that conflicts with the decision of another state Court of last resort or of a United States Court of Appeals. Petitioner also fails under Rule 10.1(c) to show that the Ohio state Court in the instant case decided an important question of federal law which has not been, but should

be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner has had his one appeal as a matter of right by the Court of Appeals of Ohio, Tenth Appellate District. Petitioner has supplied no reason to either the Supreme Court of Ohio or to this Court to grant a discretionary review. Petitioner's argument set forth on pages 12 through 39 (which exceeds the 30-page limit established by Rule 33 of this Court) merely rehashes the argument made to and rejected by the Ohio Court of Appeals.

Petitioner misstates the Ohio law applicable to the instant case. Rule 3(A) of the Ohio Rules of Civil Procedure ("Civ. R.") until July 1, 1991, provided that a "civil action is commenced by filing a Complaint with the Court, if service is obtained within one year from such filing." Petitioner at page 12 of his Petition misstates Civ.R. 3(A) as a one-year service requirement. Petitioner then misapplies at pages 14 and 15 of his Petition the decision by the Supreme Court of Ohio in *Mayhew v. Yova* (1984), 11 Ohio St. 3d 154, which he characterizes to be that a defendant not served within one year had no obligation to plead within the year and failure to do so does not waive the defense of lack of personal jurisdiction. In *Mayhew*, the Complaint was filed on November 6, 1980. Service was *never* obtained. Defendant moved to dismiss on December 1, 1981, asserting that the action was barred by the two-year statute of limitations. The motion was granted and both the Court of Appeals and the Supreme Court of Ohio affirmed. The plaintiff in *Mayhew* never moved for leave to file an amended or a second amended complaint as Respondent did in the instant case. Also, all defendants were served in the instant case whereas the defendant was *never* served in *Mayhew*. Finally, the statute of limitations ran in *Mayhew* but did not in the instant case.

Contrary to the argument by Petitioner on page 16 of his Petition, his wife and his entities were not on solid ground until the Court of Appeals Opinion on December 17[31], 1991, because there had not been a string of related cases [*Mayhew*] decided by the Supreme Court of Ohio [no citations] supporting their position, and Respondent had not been dilatory in light of Petitioner's concealment of the transfers, concealment of the additional mortgages, affidavit of prejudice, interlocutory appeal, Petition for Writ of Certiorari to this Court, requested stay of proceedings pending appeals and failure to respond to discovery--all within one year of the filing of the Complaint in the instant case.

The nub of Petitioner's argument on pages 16 and 17 of his Petition is that the decision in *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549, "sets an inappropriate standard for service in Ohio as adopted by the Appellate decisions in this case and, consequential denial of due process." Once again, Petitioner misstates the law of Ohio established in *Goolsby*.

In *Goolsby*, the Supreme Court of Ohio recognized that *had* the plaintiff "dismissed her complaint and again filed it at the time instructions for service were given, the action would have been commenced according to Civ.R. 3(A). We believe under these circumstances, the Civil Rules should not require a plaintiff to refile a complaint identical to one which has previously been, and remains, filed. Such an exercise could not be said to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice. Civ.R. 1(B). Consequently, we hold that when service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to

obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint." *Goolsby*, 61 Ohio St. 3d 549, 550-551.

Further, Petitioner at page 25 of his Petition improperly implies that the Supreme Court of Ohio held in *Saunders v. Choi* (1984), 12 Ohio St. 3d 247, that Civ.R. 3(A) is an absolute rule requiring dismissal if service is not obtained within one year of filing. Petitioner also states on page 26 of his Petition that "*Saunders* is still the prevailing view." Petitioner's error is that he only implies from *Saunders* the statement that "since appellant failed to obtain service of process within the time period allotted in Civ.R. 3(A). . . appellant's action must fail." *Saunders*, 12 Ohio St. 3d at 250. What Petitioner omits from *Saunders* is the rationale for the statement which *is* the fact that in *Saunders* the plaintiff under the savings statute only had a one year statute of limitation within which to commence her action under Civ.R. 3(A) and, when she failed to obtain service within that one year, her action failed.

No such one year statute of limitation operated in the instant case to require service within one year of filing. Accordingly, Petitioner's failure to understand the holding in *Saunders* and the longstanding basic principles recognized in *Goolsby* caused Petitioner to rely on his own technical interpretation of the law to his detriment and to the detriment of his wife and entities to the extent he so advised them.

Petitioner on page 29 of his Petition misstates the fact that personal jurisdiction was not obtained over his wife. In fact, the Trial Court deemed the Amended Complaint filed on June 7, 1989. Petitioner's three corporate entities were served within one year under Civ.R. 3(A) between April 9, 1990, and May 8, 1990, and were thereafter represented by counsel. The Trial

Court granted leave on September 5, 1990, and Respondent filed its Second Amended Complaint on September 6, 1990, with a request for service by publication on Petitioner's wife and two non-corporate entities. Service by publication was completed and just before their answer date, the three defendants on November 19, 1990, requested from the Federal Court extensions of time to move or plead, thereby acknowledging service on them. Petitioner, his wife and all five entities had been served with the summons and the Second Amended Complaint well before the February, 1991, judgment was granted.

On pages 31 through 37 of his Petition, the Petitioner misstates the facts and the law with respect to the certified mailing of filings to him. Respondent began such mailings after Petitioner claimed not to have received a voluminous package of motions mailed to him by Respondent on September 17, 1990.

Although Petitioner is correct in stating on page 35 of his Petition that service *may* be made by ordinary mail, he missstates on page 35 of his Petition that service *must* be by ordinary mail. Petitioner further misstates on page 36 of his Petition that Respondent "intentionally continued certified mailings" to deprive him of "his rights to due process." Respondent wanted to insure Petitioner's rights of due process by having proof that Petitioner received all filings. All Petitioner had to do was sign for and accept the certified mail -- he chose not to do so. Petitioner also omits to mention that copies of all filings were sent by regular mail to his wife, his two non-corporate entities and counsel for his three corporate entities.

Despite these regular mailings Petitioner misstates on page 37 of his Petition that he was denied the filings upon which his absence of response was construed as grounds for default judgment where he had no duty or ability to respond to unserved

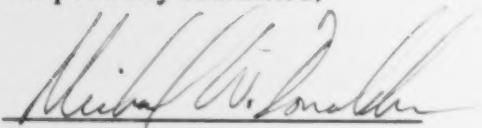
filings. As already noted herein, Petitioner was ordered on May 18, 1990, July 27, 1990, January 18, 1991, and January 30, 1991, to provide complete and non-evasive answers to Respondent's eight interrogatories. On February 6, 1991, Petitioner faxed a single page response objecting to the first question as to his wife's address and denying any knowledge on the other questions related to his entities. See Court of Appeals Opinion, Appendix A-5 through A-12 to Petition. None of these orders or motions requesting them were filed during the certified mail period from September 17, 1990, to January 4, 1991.

Finally, Petitioner misstates on page 37 of his Petition the 1975 unreported opinion. As noted on Appendix A-43 to the Petition, "notice of a hearing for summary judgment" was required to be sent out by regular mail after certified mail was unclaimed or refused. No such notice of a hearing for summary judgment was involved in the instant case.

CONCLUSION

For all of the foregoing reasons, Respondent asserts that the instant case should not be reviewed by this Court.

Respectfully submitted,



Michael W. Donaldson
P.O. Box 1008
Columbus, Ohio 43216
(614) 464-6315
Counsel for the Respondent

Certificate of Service

The undersigned counsel for respondent hereby certifies that three copies of this Brief of Respondent were served by regular U.S. Mail, postage prepaid, this 26th day of October, 1992, upon the following persons:

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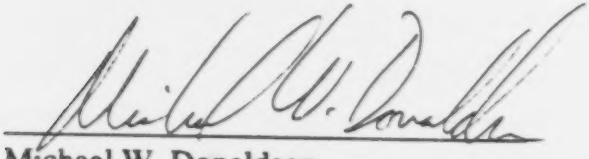

Michael W. Donaldson

NATIONAL HERITAGE

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May 11, 1990

James Hedden, Esq.
VORYS, SATER, SEYMOUR & PEASE
52 East Gay Street
Columbus, Ohio 43216
Via Fax #464-6350

Re: Bank One, Columbus, N.A.
vs. Charles William O'Brien, et al.
Case #89CV 03 1790

Dear James:

As I recall, at the status conference before Judge Stratton on May 9, 1990, you indicated that service on Karen Sue O'Brien, F&S Properties and the HKW Corporation would commence by publication, in spite of the expiration of the one year prerequisite therefore.

Please be advised that pursuant to Civil Rules 3, 4 and applicable Ohio case law, such service or attempt therefore is inherently futile and vests no jurisdiction whatsoever upon the Court. As such, should you, Bank One or Vorys continue to pursue such service, which will seriously damage the credit and reputation of all O'Brien-related entities and personnel, I shall

seek substantial redress and other relief predicated to reconcile such acts against you personally, Bank One, its officers, directors and John B. McCoy, Vorys and The Daily Reporter.

This letter is to place all recipients thereof on notice that upon the commencement of such service by publication, immediate redress shall be filed with the Court. Accordingly, I would give the matter serious consideration before the problems that already present a serious downside risk to the interests of Bank One become much more serious and widespread for the aforementioned entities.

Sincerely,

C.W. O'Brien

CWO:vcf

cc: Arthur Vorys
Via Fax #464-6350

John B. McCoy
Via Fax #248-5424

The Daily Reporter
c/o Dan Schillingburg
Fax #224-8649